Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CHARLES E. PAPPAS, M.D.,

Petitioner,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is not the issuance of a non-precedential opinion by a Court of Appeals violative of a litigant's rights under Article III of the United States Constitution and improper as a matter of appellate process?

2. Did not the Court of Appeals err in affirming the grant of judgment as a matter of law on the basis of insufficient evidence, where the Court of Appeals also held that the District Court erred in refusing to admit certain evidence?

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are named in the caption.

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OPINIONS BELOW

The April 25, 2001, opinion of the Third Circuit Court of Appeals is unreported and appears in the Appendix to this petition at pages 1a to 15a. The District Court's August 10, 2000, findings of fact, conclusions of law, and final judgment appear at pages 16a to 26a of the Appendix. The Third Circuit Court of Appeals' May 29, 2001, Order denying the petition for rehearing appears at page 27a of the Appendix.

STATEMENT OF JURISDICTION

The Third Circuit Court of Appeals issued its opinion on April 25, 2001. A timely petition for rehearing was filed on May 9, 2001. The Court of Appeals entered its order denying the petition for rehearing on May 29, 2001. On August 3, 2001, this Court granted petitioner's application for extension of time in which to file a petition for a writ of *certiorari* and extended the time within which petitioner could file his petition to and including October 26, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

Internal Operating Procedures 5.3, 5 4, and 5.8 of the United States Court of Appeals for the Third Circuit provide:

> 5.3 Non-precedential Opinions. Opinions which appear to have value only to the trial court or the parties are designated by the court as unreported and are not sent by the court for publication. These may include, at the option of the majority of the panel, divided panel opinions affirming the judgment of the trial court, granting or denying a petition for review or enforcement of the order of an administrative agency, divided or unanimous opinions reversing or vacating the judgment of the trial court or remanding to the trial court, and per curiam opinions. Per curiam opinions may be utilized for affirming, reversing, vacating, modifying, setting aside, or remanding the judgment, decree, or order appealed from; for dismissing an appeal; for granting or denying

a petition for review; and for granting or refusing enforcement of the order of an administrative agency. An opinion that is designated by the court as unreported shall state "unreported, not precedential" on the face of the opinion.

5.4 Memorandum Opinions. When the panel unanimously determines to affirm the judgment, order, or decision of the court under review, to dismiss an appeal, or to enforce or deny review of the order or decision of an administrative agency, and determines that a written opinion will have no precedential or institutional value, the author may choose to write a memorandum opinion briefly setting forth the reasons supporting the court's decision as an alternative to preparation of a judgment order. In that circumstance, the authoring judge will also prepare the judgment. Memorandum opinions are not used when the disposition of the court is to reverse or remand to the trial court or to grant review or deny enforcement of an order of an administrative agency or to remand to such an agency.

> 5.8 Citations. Because the court historically has not regarded unreported opinions as precedents that bind the court, as such opinions do not circulate to the full court before filing, the court by tradition does not cite to its unreported opinions as authority.

3d. Cir. I.O.P. 5.3-5.4, 5.8.

STATEMENT OF THE CASE

In 1989, Dr. Charles E. Pappas, a plastic surgeon, was involved in a motor vehicle accident that resulted in various injuries, most notably to his hands. Following the accident, Dr. Pappas experienced a gradual deterioration of his ability to practice medicine. After an unsuccessful operation in 1994 to restore function to his hands, Dr. Pappas stopped performing surgery in 1995. Dr. Pappas has since been unable to resume his practice. App. at 2a.

Dr. Pappas had purchased disability insurance policies in 1988 from UNUM Life Insurance Company of America. Those policies provided compensation for both total and partial loss of earnings due to disability. The policies also contained provisions for cost-of-living ("COLA") adjustments. App. at 3a.

In 1994, Dr. Pappas submitted claims on the policies due to his disability. Following debate between Dr. Pappas and UNUM over the amount of payments due under the

policies, including the amount of COLA benefits, and numerous requests by UNUM for additional information from Dr. Pappas, UNUM finally offered to repurchase the policies from Dr. Pappas. Dr. Pappas declined this offer. *Id.*

UNUM, on two occasions, terminated certain benefits, but after negotiations between the parties, reinstated them. UNUM ultimately reduced certain COLA benefits and declined to reinstate them. Dr. Pappas then commenced this action. In his complaint, Dr. Pappas sought a declaration of rights concerning his benefits, an award of benefits, and an award of compensation for expenses that he asserted UNUM had improperly caused him to incur. App. at 3a-4a. Dr. Pappas also sought damages for UNUM's bad faith in the handling of his claims, and alleged that UNUM was trying to force him to sell his policies back to UNUM at a fraction of their worth. App. at 4a. UNUM filed counterclaims seeking both recovery of an alleged overpayment of disability benefits and certain declarations of its rights under the policies. *Id.*

The case went to trial in the United States District Court for the Eastern District of Pennsylvania. The District Court, pursuant to a pre-trial motion, had excluded evidence under Fed. R. Evid. 408 of settlement negotiations (specifically, UNUM's offer to repurchase the policies) that Dr. Pappas intended to use for the purpose of showing UNUM's bad faith in processing his insurance claim. App.

at 5a. At the close of Dr. Pappas' case-in-chief, the Court granted UNUM's Rule 50 Motion and then, ruling that Dr. Pappas was not entitled to a jury trial as to the relief sought in UNUM's counterclaims, dismissed the jury. App. at 4a-5a. Finally, the Court ruled against Dr. Pappas on UNUM's counterclaims, holding that UNUM had overpaid past benefits (in the amount of the disputed COLA benefits) and that UNUM had no further obligation to pay COLA benefits on Dr. Pappas' disability claim. App. at 4a.

Dr. Pappas appealed to the United States Court of Appeals for the Third Circuit, that the District Court erred in: (a) not permitting him to introduce evidence of UNUM's offer to repurchase the disability policies in order to show bad faith on UNUM's part; (b) not permitting his claims to go to a jury; and (c) not permitting UNUM's counterclaims to go to a jury. App. at 5a, 8a, 15a.

The Court of Appeals held argument and then issued an "Unreported-Not Precedential" "Memorandum Opinion," in which it ultimately rejected Dr. Pappas' arguments. App. at 16a-26a. The Court ruled that the District Court erred in excluding Dr. Pappas' proffered evidence with respect to UNUM's offers to repurchase the disability policies. The Court agreed with Dr. Pappas that the admission of such evidence did not violate Rule 408 because "evidence to establish an insurer's bad faith in processing a claim is offered for a purpose other than to

establish liability on the claim itself." App. at 6a. However, the Court of Appeals went on to hold that the District Court's error was harmless, thus ultimately disposing of this issue in UNUM's favor. App. at 7a-8a.

The Court of Appeals also rejected Dr. Pappas' argument that the District Court had improperly granted UNUM's Rule 50 motion. Specifically, the Court of Appeals held that: (a) UNUM did not engage in any improper business practice in investigating the coverage disputes, nor did it act in bad faith in suspending benefits, App. at 10a-12a; (b) notwithstanding Dr. Pappas' evidence that UNUM sought to repurchase his disability policies, Dr. Pappas did not offer sufficient evidence from which a jury could find, by clear and convincing evidence, that UNUM acted in bad faith in claiming an overpayment in benefits, App. at 12a-14a; and (c) the evidence, viewed in the light most favorable to Dr. Pappas, did not supply a basis for a jury to find that Dr. Pappas clearly and convincingly demonstrated that UNUM acted in bad faith in deciding he was no longer eligible for a waiver of premium, App. at 15a.

Without discussion or analysis, the Court of Appeals further summarily rejected Dr. Pappas' other arguments – namely, that the District Court erred in dismissing the jury and trying UNUM's counterclaim as a bench trial; in declaring that the COLA benefits effective October 14, 1991, were not payable in the future; and in holding that UNUM

had overpaid Dr. Pappas COLA benefits by $110,701.55. App. at 15a. Dr. Pappas filed a timely petition for Panel Rehearing pursuant to Fed. R. App. P. 40, which the Court of Appeals denied by Order entered on May 29, 2001. App. at 27a.

REASONS FOR GRANTING THE WRIT

I. *CERTIORARI* SHOULD BE GRANTED TO PROVIDE GUIDANCE TO THE COURTS OF APPEALS AS TO THE CONSTITUTIONALITY AND PROPRIETY OF NON-PRECEDENTIAL OPINIONS.

The Court of Appeals issued its opinion in this case as an "Unreported - Not Precedential" "Memorandum Opinion." The Court did so under the authority of Third Circuit Internal Operating Procedures 5.3 and 5.4, the full text of which are set out *supra*. These internal rules permit the court to issue unreported opinions in two forms: "non-precedential opinions" and "memorandum opinions." The former involves cases in which the opinion "appears to have value only to the trial court or the parties." The second involves cases in which "the panel unanimously determines to affirm the judgment, order, or decision of the court under review." *See* 3d Cir. I.O.P. 5.3, 5.4

In the case of both forms of unreported opinions, the Third Circuit's internal rules make clear that they will not be

regarded as precedent by the court. Specifically, Internal Operating Procedure 5.8 provides:

> 5.8 Citations. Because the court historically has not regarded unreported opinions as precedents that bind the court, as such opinions do not circulate to the full court before filing, the court by tradition does not cite to its unreported opinions as authority.

3d Cir. I.O.P. 5.8.

The increasingly-common practice among the courts of appeals of issuing unreported, non-precedential opinions[1] has become the subject of much debate in the federal judiciary and among legal scholars. In *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001), Judge Smith of the United States Court of Appeals for the Fifth Circuit dissented from his colleagues' decision not to grant a rehearing on the issue, stating, "[a rehearing] would have given this court an opportunity to examine the question of unpublished opinions generally, an issue that is important to

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[1] *See* Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 71, 72 (2001)("For more than a quarter century, the United States Courts of Appeals have maintained two bodies of law. One is published, widely disseminated, and fully precedential. The other, now encompassing nearly 80% of all dispositions on the merits, is unpublished, erratically distributed, and rarely precedential.")(relying on statistics gathered from the Administrative Office of the United States Courts).

the fair administration of justice in this circuit." *Williams*, 256 F.3d at 260. Judge Smith went on to explain: "the practice of refusing to recognize unpublished opinions as precedent raises important prudential questions...[t]he law is supposed to inform the choices of potential litigants. How can this circuit's decisions do so, if they carry no predictive effect?" *Id.* at 263. *See also Melancon v. United States*, 972 F.2d 566, 570 n.2 (5th Cir. 1992)(Parker, D.J. concurring specially); *Pruitt v. Levi Strauss and Co.*, 932 F.2d 458, 467 n.2 (5th Cir. 1991)(Johnson, J., dissenting in part).[2]

Indeed, the issue is of such importance that at least three members of the appellate judiciary have felt compelled to publish academic articles on the subject. *See* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Decisions*, Cal. Lawyer, June 2000, at 43; Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219 (1999).

Not only is the escalating practice of issuing non-precedential opinions of concern to the bench and to legal scholars, it also is a matter of fundamental importance to

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[2] The controversy has been no less profound among scholarly publications: *See* Merritt & Brudney, *supra*, at 72 ("[The] debate has become especially compelling...it raises profound questions about the place of these opinions in our jurisprudence."); Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & The Nature of Precedent*, 4 Green Bag 2d 17, 18 (2000)("[the debates] prompt questions about the fundamental nature of judging.").

litigants such as petitioner. Such litigants have been denied the certainty of knowing that their cases have been given the requisite amount of consideration in the courts of appeals, which are, for all intents and purposes, courts of last resort for most litigants. While the practice of issuing unreported, non-precedential opinions may be convenient to the courts, it serves no purpose - in fact, it disserves the bar. It places litigants like Dr. Pappas in the untenable position of not knowing whether the Court of Appeals in fact gave his case the time and effort it required, and whether the Court truly considered the validity of the District Court's opinion. If, in fact, the courts of appeals are effectively the courts of last resort, then they cannot abdicate their responsibility in the name of caseload control and convenience. To do so vastly diminishes public confidence in the judicial system.

Moreover, the Court of Appeals' failure to publish its opinion is particularly egregious here, where the Court actually made new law on one critical point: whether an insurer's offer to repurchase insurance policies is admissible as evidence of the insurer's bad faith, notwithstanding Federal Rule of Evidence 408. App. at 5a-7a. Under such circumstances in particular, the Court's opinion should have been reported and should have been accorded precedential status.

In fact, Judge Smith in *Williams* recognized this very phenomenon: "[t]here are opinions that, though

unpublished, do establish a new rule of law or apply existing law to distinct facts. ... Empirical evidence suggests that [unpublished cases which establish new law] are more common than one might think." *Williams*, 256 F.3d at 262. Indeed, "As an empirical matter, plenty of unpublished decisions have been accepted for review and reversed by the Supreme Court, demonstrating that it is difficult to make prospective decisions about which legal issues are 'easy' in the abstract." *Williams*, 256 F.3d at 262 n.3 (quoting Boggs & Brooks, *supra*, at 20-21).

The debate regarding non-precedential opinions recently came to a head when a panel of the Eighth Circuit Court of Appeals held that Article III of the United States Constitution requires that all of the holdings of federal courts of appeals constitute binding precedent. *Anastasoff v. United States*, 223 F.3d 898, *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000)(discussing U.S. CONST. art. III, § 1, cl.1).[3] The

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[3] *Anastasoff* was vacated as moot when the parties settled their claims out of court before the *en banc* hearing could be held. However, *Anastasoff* has since been cited as "persuasive authority," *Hart v. Massanari*, 2001 U.S. App. LEXIS 20863, at *2 (9th Cir. Sept. 24, 2001). Moreover, as noted above, the issue of the constitutionality and propriety of non-precedential opinions is of great concern in the legal community. In the four months after the panel issued its opinion in *Anastasoff*, a Shephards search reveals that the case was cited in ten different United States District Court decisions. It continues to be cited even in its persuasive state by all levels of courts, and in twenty-four separate articles in law reviews and periodicals.

Ninth Circuit Court of Appeals flatly disagreed, holding that, "[u]nlike the *Anastasoff* court, we are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority." *Hart v. Massanari*, 2001 U.S. App. LEXIS 20863, at *60 (9th Cir. Sept. 24, 2001). Given the stakes for both the bar and the judiciary, this Court should grant this petition in order to give critical guidance to the courts of appeals as to whether the now-common practice of issuing unreported, non-precedential opinions is constitutional and proper.

A. The Courts of Appeals' Varying Approaches.

Recently, there has been a proliferation of appellate opinions that carry such designations as "unpublished" or "unreported," and "non-precedential." The sheer number of cases disposed of with the above designations has rapidly outpaced the number of cases that are published and which are intended to have traditional precedential effect. *See* note 1, *supra*. This phenomenon has frustrated litigants' efforts to ascertain any particular circuit's law as it relates to a wide variety of factual scenarios. Equally frustrating has been the diversity of thought among the circuits as to how to treat such opinions within the context of the body of law they do choose to treat as binding.

First, in some circuits, it is impossible even to find unreported opinions, whereas other circuits release their unreported opinions to on-line research sources such as LEXIS or Westlaw. Second, the circuits treat their unreported opinions in terms of the precedential weight given to them, if any, in a wide variety of ways. The Fifth Circuit considers its pre-1996 unpublished opinions as binding authority, and its post-1996 opinions as persuasive authority. 5th Cir. R. 47.5.3-4. The Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits permit litigants to cite and discuss unreported opinions, yet such opinions remain no more than persuasive authority. *See* 4th Cir. R. 36(c); 6th Cir. R. 28(g); 8th Cir. R. 28A; 10th Cir. R. 36.3; 11th Cir. R. 36-2.

The First, Second, Seventh, Ninth, District of Columbia, and the Federal Circuits not only do not accord even persuasive weight to their unpublished opinions, but discourage (and for most circuits, prohibit) any mention of the same. *See* 1st Cir. R. 36(b)(2)(F); 2d Cir. R. 0.23; 7th Cir. R. 53(b)(2)(iv); 9th Cir. R. 36-3; D.C. Cir. R. 28(c); Fed Cir. R. 47.6. The Third Circuit does not address litigants' rights with respect to citation of unreported opinions, but does state that the court "by tradition" will not cite its own unpublished opinions. 3d Cir. I.O.P. 5.8. And, as noted above, all these circuits vary as to the availability of these opinions on research portals.

B. The Eighth Circuit Panel's Opinion in *Anastasoff v. United States.*

Faced with this morass and with the increasing frequency by the courts of appeals in the use of non-precedential opinions, in *Anastasoff v. United States*, 223 F.3d 898, *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000), a panel of the United States Court of Appeals for the Eighth Circuit held that issuing non-precedential opinions "is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the 'judicial.'" *Id.* at 899. The panel in *Anastasoff* based its conclusion on an examination of the historical basis of the rule of law, stating that it occupies an essential element in American jurisprudence—similarly-situated parties should be held to the same standard of law. *Id.* at 900 (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991)).

The crux of the issue for the panel in *Anastasoff* was a legitimate fear of creating an alternative body of law. Such a body of law may or may not have any reflection on the state of the law as it stands, and would exist to reduce the workload of some appellate judges. The panel did not believe such a reason adequate to justify not treating all cases with the requisite due care. *Anastasoff*, 223 F.3d at 904. "We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as precedent. If this is true, the judicial system is

indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only." *Id.* Expressed even more forcefully, "a more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles." *Id.* (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 377 (1833)). According to *Anastasoff*, "lest we be misunderstood, we stress that we are not here creating some rigid doctrine of eternal adherence to precedents...If the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed." *Anastasoff*, 233 F.3d at 904.

The Court of Appeals for the Ninth Circuit has taken the directly contrary view.

C. The Ninth Circuit's Opinion in *Hart v. Massanari.*

The United States Court of Appeals for the Ninth Circuit expressly rejected *Anastasoff's* holding in *Hart v. Massanari*, 2001 U.S. App. LEXIS 20863 (9th Cir. Sept. 24, 2001). As the Court stated, "[*Anastasoff*] may seduce members of our bar into [citing not precedential opinions in violation of Ninth Circuit rules] under the mistaken impression that it is unconstitutional. We write to lay these speculations to rest." *Id.* at *2-3.

Disagreeing that the concept of binding precedent is a core value of the Constitution, the Ninth Circuit expressed that strict adherence to such a concept would unduly "freeze certain aspects of the law into place, even as other aspects change significantly." *Id.* at *12. Indeed, the Ninth Circuit took issue with the idea that written law can adequately capture precedent and rules of law in a precise enough way to justify treating all cases as precedent. "[B]inding precedent means something different altogether when a court speaks with seven or nine voices than with a single voice. Nine judges speaking separately may well agree on the outcome of a case, but they cannot give the kind of specific guidance as to the conduct of future cases that can be found in a single opinion speaking for the court." *Id.* at *11.

Central to the Ninth Circuit's holding were its assertions that a system of precedent fails to account for changes in custom, and that ignoring the rulings set in some cases is tantamount to ignoring precedent as a whole. As the Court explained, "[t]he common law, at its core, was a reflection of custom, and custom had a built-in flexibility that allowed it to change with circumstance." *Id.* at *24.

* * *

With the issuance of a non-precedential opinion, the Court of Appeals has failed petitioner by effectively telling him, "[w]e may have decided this question the opposite

way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday." *Anastasoff*, 233 F.3d at 904.[4] When the courts of appeals issue unreported opinions with non-precedential status, the result can only be diminished confidence by litigants such as Dr. Pappas that they have, indeed, had their day in court. *Certiorari* should be granted in order to provide guidance to the courts of appeals on this important issue.

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[4] The issue is particularly apt in this case, where the Court of Appeals disregarded clear binding precedent in the context of a non-precedential opinion. The Pennsylvania Supreme Court has clearly stated that no cause of action can exist for unjust enrichment when the claim is predicated on a contract. *See Schott v. Westinghouse Electric Corp.*, 259 A.2d 443, 448 (Pa. 1969). The United States Court of Appeals for the Third Circuit applied *Schott*'s explanation of Pennsylvania law in *Benefit Trust Life Ins. Co. v. Union Nat. Bank*, 776 F.2d 1174, 1177 (3d Cir. 1985). UNUM's counterclaim was based entirely on a theory of unjust enrichment arising out of a contract. Thus, the Court of Appeals essentially disregarded its very own precedent in affirming the judgment for UNUM on its counterclaim. To do so, the Court could not have issued a binding opinion, as such an opinion would have been an implicit overruling of *Benefit*, something only the *en banc* Court could do. *See* 3d Cir. I.O.P. 9.1.

II. *CERTIORARI* SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S GRANT OF JUDGMENT AS A MATTER OF LAW ON THE BASIS OF INSUFFICIENT EVIDENCE, WHILE AT THE SAME TIME HOLDING THAT THE DISTRICT COURT HAD ERRED IN REFUSING TO ADMIT EVIDENCE.

The true underlying cause of UNUM's behavior remains a factual one. A jury was the proper body to decide the relative weight to give the various pieces of evidence presented, as well as the erroneously-excluded evidence. "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon Theaters Inc., v. Westover*, 359 U.S. 500, 501 (1959)(quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). "The right to a jury trial is a constitutional one," but "no similar requirement protects trials by the court." *Beacon*, 359 U.S. at 510.

It is the jury alone that should have been entrusted with the decision as to whether or not UNUM's behavior was sufficient to give rise to a bad faith insurance claim. When the District Court granted UNUM's motion for judgment as a matter of law, it improperly denied petitioner's right to have his claims heard by a jury.

But, to make matters worse, not only did the Court of Appeals affirm the grant of UNUM's Rule 50 motion - it did so after having held that the District Court had erroneously excluded a critical piece of evidence with respect to Dr. Pappas' bad faith claim (the fact that UNUM had sought to repurchase the policies). The Court of Appeals' conclusion that, on the one hand, the District Court properly granted judgment as a matter of law for UNUM, and, on the other, that the District Court's exclusion of key evidence was harmless error, defies logic.

As the Court of Appeals held, the District Court erred in refusing to admit evidence of UNUM's bad faith in administering petitioner's disability claim. App. at 7a. The purpose of Dr. Pappas' proffer of this evidence was to show bad faith - not to establish liability on the claim itself. While Federal Rule of Evidence 408 generally excludes evidence of conduct during settlement negotiations to prove a party's liability, the Court of Appeals properly deemed that using such evidence to establish bad faith fell outside the Rule 408 prohibition. App. at 5a-7a.

However, the Court of Appeals then went on to hold that the error was merely harmless. App. at 7a-8a. But failing to admit the evidence that UNUM had sought to repurchase the policies not only prohibited Dr. Pappas from establishing his claim for bad faith, but also it improperly provided the basis for the District Court to direct a verdict

against Dr. Pappas. For the Court of Appeals then to state that the failure to admit the evidence was harmless error since the directed verdict was proper, *see* App. at 13a-14a, is circular indeed.

It is impossible to determine whether or not the directed verdict was harmless error without the admission of the disputed evidence. As such, Dr. Pappas' substantial rights were seriously affected when he was denied his opportunity to present his argument to a jury. *Certiorari* should be granted in order to determine the scope of petitioner's right to a jury trial as well as to examine the limits of the harmless error doctrine.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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Dated: October 26, 2001.

Filed: April 25, 2001

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-2484

CHARLES E. PAPPAS, M.D.,

Appellant

v.

UNUM LIFE INSURANCE COMPANY
OF AMERICA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 97-07162)
District Judge: Honorable Herbert J. Hutton

Argued April 3, 2001

BEFORE: ROTH, STAPLETON, and GREENBERG,
Circuit Judges

(Filed: April 25, 2001)

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MEMORANDUM OPINION OF THE COURT

GREENBERG, *Circuit Judge*

This matter comes on before this court on appellant Charles E. Pappas' appeal in this action arising from claims he made on two disability insurance policies issued by appellee UNUM Life Insurance Company of America. Inasmuch as we are writing only for the parties' benefit rather than for publication, we merely summarize the background of the case.

Pappas' claims arose out of injuries he sustained in a 1989 automobile accident which led to a progressive impairment of his ability to use his hands, obviously a crucial matter to him as he is a plastic surgeon. Unfortunately, surgical intervention was apparently unsuccessful and he alleges that as a result of his condition in June 1995 he stopped performing operations. He has not resumed the practice of plastic surgery.

Pappas has had a long history of dealings with UNUM with respect to disability insurance dating back to 1980 when he purchased income protection disability coverage from that company. The current dispute, however, involves policies UNUM issued in 1988 with provisions for compensation on account of total and partial loss of income. As highly significant in this litigation, the policies, as amended, provided for cost-of-living ("COLA") adjustments which are subject to certain limitations.

In August 1994, Pappas made claims on the policies on account of his disability. During the next several years, in the course of which UNUM made substantial payments on the policies, Pappas and UNUM had numerous disputes as to what was due on them. This is hardly surprising as the policies are complex and the benefits they provide depend on the insured's physical condition and income. As a result of the disputes, which at times seem to have been acrimonious, UNUM from time to time sought additional information from Pappas and carefully examined his claims. Moreover, in an action leading to a central dispute in this litigation, UNUM unsuccessfully attempted to repurchase Pappas' policies, an undertaking which, if accepted by Pappas, would have substituted a lump-sum payment for the periodic payments due under the policies.

Ultimately, when the parties were unable to resolve their differences, Pappas commenced this litigation by filing a writ of

summons in the Court of Common Pleas, Philadelphia County, Pennsylvania. UNUM removed the case to the district court where it remained after the court denied Pappas' motion to remand.

In his complaint, Pappas alleged that UNUM had acted in bad faith in processing his claim for disability benefits and thus violated 42 Pa. Cons. Stat. Ann. § 8371. Pappas sought damages for this alleged violation. He also sought compensation for the expenses he incurred in complying with UNUM's investigation of his disability claim, as well as a declaration of his rights regarding the method to be used in calculating his benefits and an award of additional benefits if UNUM was allowed to disavow an alleged agreement between the parties as to the inception date of Pappas' disability.

UNUM filed an answer to the complaint as well as a counterclaim seeking recovery of disability benefits which it asserted it overpaid. After Pappas replied, UNUM amended its counterclaim to include an allegation that Pappas was not entitled to certain COLA benefits as they were precluded under exclusionary riders issued effective October 14, 1991. Thus, UNUM sought restitution and a declaration that it was not obligated to pay certain COLA benefits.

During the trial of the case, UNUM made a successful motion seeking judgment as a matter of law under Fed. R. Civ. P. 50 on Pappas' claims. After granting the motion, the court

dismissed the jury as it ruled that Pappas was not entitled to a jury trial on UNUM's counterclaim. Following a bench trial, the court ruled under Fed. R. Civ. P. 52(a) and 58 that UNUM had overpaid COLA benefits in the amount of $110,701.55. Additionally, the court entered a declaratory judgment that, effective October 14, 1991, COLA benefits were not payable. Pappas then filed a timely notice of appeal.

Pappas' first argument is that the district court erred in excluding evidence of UNUM's offers to repurchase the disability policies as, in his view, the court erroneously excluded evidence of the offers on the basis that the offers were settlement negotiations. Pappas contends that this ruling was incorrect because he sought to introduce UNUM's offers as evidence of its bad faith.

Fed. R. Evid. 408 generally excludes evidence of conduct during settlement negotiations to prove a party's liabilities for the disputed claim. Such evidence may be admitted, however, "when [it] is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." *Id.* We are satisfied that evidence to establish an insurer's bad faith in processing a claim is offered for a purpose other than to establish liability on the claim itself. Thus, inasmuch as the district court dealt with Pappas' claim that UNUM acted in bad faith in investigating his claims on the

disability policies, evidence of UNUM's offers to repurchase them to demonstrate that point should not have been excluded under Rule 408 because, rather then being offered to prove liability for the payments, it was "offered for another purpose." *See Athey v. Farmers Ins. Exch.*, 234 F.3d 357, 362 (8th Cir. 2000) (holding evidence of insurer's conduct during settlement conference was not inadmissible because it was "offered for another purpose," namely to show bad faith); *Council for the Nat'l Register of Health Serv. Providers in Psychology v. American Home Assurance Co.*, 632 F. Supp. 144, 146 n.1 (D.D.C. 1985) (same); *Olin Corp. v. Insurance Co. of N. Am.*, 603 F. Supp. 445, 450 (S.D.N.Y. 1985) (nothing in dicta that Rule 408 may not exclude evidence that shows bad faith failure of insurance carrier to settle).

We reach this conclusion notwithstanding cases UNUM cites that hold to the contrary. *See Light v. Allstate Ins. Co.*, 48 F. Supp. 2d 615, 617 (S.D.W.V. 1988); *Tiscornia v. The Travelers Corp.*, No. 1:95 CV 862, 1996 U.S. Dist. LEXIS 17691, at *30 (W.D. Mich. Oct. 28, 1996).[1] In rejecting the holdings in those cases, we have not lost sight of the policy of Rule 408 to promote and encourage settlement negotiations. *See Affiliated Mfrs., Inc. v.*

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[1] UNUM cites to two other cases in support of its argument that this evidence was properly excluded, *Johnson v. Occidental Fire & Cas. Co.*, 954 F.2d 1581, 1585 (11th Cir. 1992), and *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583, 592 (E.D. Pa. 1999). We do not discuss these cases, however, as neither has more than a tangential relationship to the issue at hand.

Aluminum Co. of Am., 56 F.3d 521, 526 (3d Cir. 1995). Nevertheless, that policy is not controlling in all cases involving offers of settlement as the rule allows introduction of evidence of settlement negotiations for purposes other than to demonstrate liability for the underlying claim. *See* Fed. R. Evid. 408. Further, under Pennsylvania law, an insurer's conduct with regard to settlement may constitute evidence of bad faith. *See Clark v. Interstate Nat'l Corp.*, 486 F. Supp. 145, 146 (E.D. Pa.) (holding insurer's failure to accept settlement proposal was evidence of bad faith), *aff'd*, 636 F.2d 1207 (3d Cir. 1980) (table); *see also O'Donnell v. Allstate Ins. Co.*, 734 A.2d 901, 907 (Pa. Super. Ct. 1999) (finding insurer's conduct during pendency of litigation may be considered evidence of bad faith). Accordingly, we reiterate that evidence of UNUM's attempts to repurchase Pappas' disability policies was not inadmissible under Rule 408 because it was offered for a purpose other than to demonstrate UNUM's liability on its policies, *i.e.*, to prove its bad faith. Thus, the district court erred in excluding the evidence.[2]

Our conclusion that the district court erred in excluding Pappas' evidence, however, does not necessarily lead us to reverse the district court's judgment because "[a]n erroneous decision to admit or exclude evidence does not constitute

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[2] Even if we viewed the issue on an abuse of discretion basis, our result would be the same. *See In re Consolidation Coal Co.*, 123 F.3d 126, 131 (3d Cir. 1997).

reversible error unless 'a substantial right of the party is affected.'" *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 752 (3d Cir. 1995) (quoting *Linkstrom v. Golden T. Farms*, 883 F.2d 269, 269 (3d Cir. 1989) and citing Fed. R. Evid. 103(a)). A nonconstitutional error in a civil suit may be deemed harmless "if it is highly probable that the error did not affect the outcome of the case." *Id.* We will discuss the harmless error issue as a portion of our opinion addressing the district court's decision to grant UNUM judgment as a matter of law on Pappas' bad faith claim.

Pappas' second argument is that the district court improperly granted UNUM's Rule 50 motion for judgment as a matter of law. A Rule 50 motion should be granted "only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonably find liability." *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993). The court must deny a Rule 50 motion "if there is evidence reasonably tending to support the recovery by plaintiff as to any of its theories of liability." *Bielevicz v. Dubinon*, 915 F.2d 845, 849 (3d Cir. 1990). We exercise plenary review on this issue. *See Lightning Lube*, 4 F.3d at 1166.

Pennsylvania law provides a cause of action for insureds against their insurers for bad faith. *See* 42 Pa. Cons. Stat. Ann. § 8371. Specifically, the statute states:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
>
> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorney fees against the insurer.

Id. Bad faith by an insurer has been defined as:

> [A]ny frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (*i.e.*, good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith.

Terletsky v. Prudential Prop. & Cas. Ins. Co., 649 A.2d 680, 688 (Pa. Super. Ct. 1994); *see Polselli v. Nationwide Mut. Fire Ins. Co.*, 23 F.3d 747, 751 (3d Cir. 1994). Section 8371 provides a cause of action independent from success upon the merits or trial of an

underlying claim. *See Horowitz v. Federal Kemper Life Assurance Co.*, 57 F.3d 300, 307-08 (3d Cir. 1995). To prevail on a bad faith claim, the plaintiff must show that the insurer did not have a reasonable basis for denying benefits under the policy and that it knew or recklessly disregarded the lack of a reasonable basis for denying the claim. *See Klinger v. State Farm Mut. Auto. Ins. Co.*, 115 F.3d 230, 233 (3d Cir. 1997). The plaintiff has the burden to prove both of these elements by clear and convincing evidence. *See Polselli*, 23 F.3d at 750.

It appears to us that Pappas has claimed that UNUM acted in bad faith in three ways: first, by suspending his benefits for several months during 1996, ostensibly on account of his refusal to cooperate with what he claims was an unreasonable investigation of his claim; second, by claiming an overpayment in benefits, allegedly to create leverage to induce Pappas to sell his policies back to UNUM and consequently reducing those payments; and third, by terminating his Waiver of Premium benefit applicable when UNUM knew he was disabled. The district court held, however, that it was "plainly apparent" that Pappas had not proven bad faith by clear and convincing evidence.

Pappas contends first that UNUM acted in bad faith by suspending its payment of disability benefits for approximately four months in 1996. He asserts that UNUM unreasonably requested irrelevant, duplicative and onerous amounts of

information, and then wrongfully denied him benefits when he refused to comply. The district court found, however, "that there was a reasonable dispute concerning plaintiff's past and present earnings which necessitated defendant's continued investigation." Specifically, the parties disagreed on how much of Pappas' income was attributable to his pre- and post-disability activities. Further, Pappas and UNUM disagreed as to the allocation of business expenses between Pappas and his business associate. These calculations were significant because, under the terms of the policies, they affected Pappas' eligibility for benefits, as well as their amount. Although Pappas argues that he had provided UNUM with all of the relevant information it possibly could need both to determine his eligibility for benefits and the amount of the payments due, UNUM was entitled to investigate further. Indeed. the disability policy expressly states:

> We must be given the information which we need to determine if a benefit is payable and how much that benefit should be. We may require relevant portions of income tax returns for the Insured or his business, income statements, vouchers for overhead expenses, and other statements or reports of receipts and payments. We may also require evidence that the Insured was liable for an overhead expense before disability began.

Appellee's App. at 296.

Therefore, it cannot be said that UNUM engaged in any improper business practices in investigating legitimate disputes and discrepancies that had a direct affect on UNUM's obligation under the disability policies. Similarly, in light of the fact that, notwithstanding the disputes surrounding its obligations, UNUM had been paying disability benefits, it cannot be said that UNUM acted in bad faith by finally suspending those benefits when Pappas stopped complying with its requests for information. *See Hofkin v. Provident Life & Acc. Ins. Co.*, 81 F.3d 365, 375 (3d Cir. 1996) (finding insured failed to prove bad faith claim where insurer refused to pay benefits to party that was "less than diligent" in providing information that was necessary to evaluate his insurance claims); *Zakeosian v. Provident Life & Accident Ins. Co.*, Civ. A. No. 97-7883, 1999 U.S. Dist. LEXIS 6292, at *5-6 (E.D. Pa. Apr. 26, 1999) (rejecting insured's bad faith claim where insurer withheld benefit payments until insured provided necessary claims information); *Federated Life Ins. Co. v. Walker*, Civ. A. No. 96-3387, 1997 U.S. Dist. LEXIS 566, at *40-41 (E.D. Pa. Jan. 17, 1997) (holding insurer's suspension of payments on five separate occasions because insured failed to provide necessary proof of loss information was not bad faith). The district court, therefore, did not err in finding this aspect of Pappas' bad faith claim unmeritorious.

Pappas also argues that UNUM acted in bad faith by claiming an overpayment in benefits, allegedly to create

leverage to induce Pappas to sell his policies back to UNUM, and consequently reducing those payments. As discussed previously, however, there was a legitimate dispute as to the amount of benefits owed under the policies. UNUM recalculated Pappas' benefit payments several times, using the various and differing financial information provided to it, each time resulting in a different amount owed, but every time resulting in the conclusion that Pappas' initial benefit payments were too high. Considering this history in light of UNUM's inability to obtain certain information from Pappas, he did not proffer enough evidence from which a jury could find, by clear and convincing evidence, that UNUM acted in bad faith.

We reach our conclusion notwithstanding Pappas' evidence that from January 1996 to March 1997, UNUM sought to repurchase his disability policies. While, as discussed above, settlement attempts by an insurer may be evidence of bad faith, Pappas' allegations, even when combined with all the other evidence in the case, would not allow a jury to conclude that he demonstrated bad faith by clear and convincing evidence. UNUM had a legitimate dispute with Pappas over the amounts due under his policies, one to which he contributed by his reluctance to comply with UNUM's investigation. Accordingly, it is not reasonable to infer that it acted in bad faith in attempting to settle the dispute. With nothing else to support his claim, and even taking into account UNUM's attempt to repurchase its policies, Pappas' evidence would not permit a

jury to conclude that Pappas clearly and convincingly established that UNUM acted in bad faith.

Finally, Pappas claims that UNUM acted in bad faith by terminating his Waiver of Premium benefit. Specifically, Pappas' policy provides:

> Waiver of Premium: After the disability has lasted for ninety days while this policy is in effect, we will waive the premium as long as the insured is unable to return to work full time in his regular occupation as a result of the injury or sickness which causes the disability. We will refund premiums already paid for that period on a pro-rated basis.

Appellee's App. at 294. Therefore, in order to qualify for a waiver of premium, the insured must not be able to work approximately the same number of hours in his regular profession as he did prior to the injury. *See id.* at 292. Here there was a dispute between Pappas and UNUM regarding exactly how much he was working following his claim for disability benefits. Although Pappas claimed that he was totally disabled, his office's billing records undermined this contention. Accordingly, the evidence, even considered in a light most favorable to Pappas, cannot be regarded as supplying a basis for a jury to conclude that he clearly and convincingly demonstrated that UNUM acted in bad faith in deciding he was no longer eligible for the waiver of premium. The district court did not err, therefore, in granting UNUM's motion for judgment as a matter of law.

Pappas' final three points on the appeal are that the district court erred in dismissing the jury and trying UNUM's counterclaim as a bench trial, in entering a declaration that the COLA benefits effective October 14, 1991, were not payable in the future, and in finding an overpayment of COLA benefits of $110,701.55. We carefully have examined these contentions and conclude that they are not meritorious. Accordingly, we reject these claims without discussion.

The order entered on August 11, 2000, will be affirmed.

TO THE CLERK:

Please file the foregoing memorandum opinion.

BY THE COURT:

/s/Morton I. Greenberg
Circuit Judge

DATED: April 25, 2001.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES E. PAPPAS,	:	CIVIL ACTION
	:	
v.	:	
	:	
UNUM LIFE INSURANCE COMPANY	:	NO. 97-7162

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND FINAL JUDGMENT

HUTTON, J. August 10, 2000

Plaintiff, on or about October 23, 1997, filed a state court complaint against Defendant UNUM Life Insurance Company ("UNUM" or "Defendant") which, *inter alia*, alleged UNUM acted in bad faith in determining his claim for disability benefits. On or about, November 21, 1997, Defendant removed the above captioned action to the United States District Court for the Eastern District of Pennsylvania. Thereafter, Defendant asserted counterclaims for a Declaratory Judgment, unjust enrichment, and overpayment of benefits. A trial on the merits commenced on July 18, 2000. On July 24, 2000, the Court granted Defendant's Rule 50 Motion, finding, as a matter of law in favor of Defendant on Plaintiff's claims.

On July 25, 2000, the Court, in a bench trial, heard Defendant's equitable counterclaims for a Declaratory Judgment

and Unjust Enrichment. Defendant abandoned its claim for overpayment of benefits. Pursuant to Federal Rule of Civil Procedure 52(a), of benefits. Pursuant to Federal Rule of Civil Procedure 52(a), the Court makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. Plaintiff purchased two individual disability income policies from UNUM.

2. The benefits payable under Plaintiff's policies were testified to at trial by Constance M. Cardamone, manager of the Portland Certified Public Accountant Team for UNUM. (*See* 7/25/00 Trans. at 6-34).

3. Disability benefits under policy LAD044461 are divided into two Coverage Groups, one providing for a maximum benefit of $4,339 per month, and the other providing for a maximum benefit of $3,100 per month. (*See* 7/25/00 Trans. at 9-11).

4. Disability benefits under policy LAD049933 insured a single coverage group with a maximum benefit of $6,199 per month. (*See* 7/25/00 Trans. at 12-13).

5. Initially, Plaintiff's policy LAD044461 contained a Cost of Living Adjustment ("COLA") rider which was

applicable only to Coverage Group Two. (*See* 7/25/00 Trans. at 11).

6. Plaintiff was not entitled to purchase COLA increases under Policy Rider CLC86 as he did not satisfy the requirements of such entitlement; specifically that the Maximum Disability Benefit had not been adjusted pursuant to the rider while the insured was under a previous disability. (*See* 7/25/00 Trans. at 14-15).

7. On or about May 31, 1991, Plaintiff completed and submitted an Application for Change with respect to policies LAD044461 and LAD049933, requesting COLA benefits on the portions of the policies which were not subject to such benefit. (*See* 7/25/00 Trans. at 12).

8. Said Application for Change is by its terms preliminary with respect to its coverage as the language of the Agreement states that "the company will rely on the information provided in this application and any subsequent medical exams or tests and other questionnaires to determine whether to provide the requested coverage."

9. Plaintiff in the Application for Change represented that he had carpal tunnel syndrome but had a "good recovery."

10. As a result of Plaintiff's disclosure of his medical history and Defendant's investigation, the COLA benefits for

which Plaintiff applied under the Application for Change were subject to an Exclusion Rider which states that "no benefit of any kind or amount is payable to anyone for any loss, impairment or disability due to, contributed to by, or resulting from carpal tunnel syndrome; radiculopathy or injury, disease or disorder of the cervical spinal region . . . ."

11. Plaintiff signed the Exclusion Rider on or about November 5, 1991, with an effective date of October 14, 1991, containing the language "once this Exclusion Rider is signed, it binds all persons claiming any interest under the policy."

12. On or about August 15, 1994, Plaintiff filed an individual Disability Claim Form for benefits under his policies for a disabling condition due to "pain [in] shoulders and hands; numbness and weakness [in] hands []; from MVA."

13. On or about August 30, 1994, Plaintiff's physician, Ronald J. Horvath, M.D., completed an Attending Physician Statement which states that Plaintiff's primary diagnosis is "cervical disk syndrome, traumatic bilateral carpal tunnel [syndrome]."

14. Plaintiff confirmed this diagnosis when he testified as a Medical Doctor and Surgeon. Such testimony reads as follows:

> Q: Doctor, do you have an opinion based on a reasonable degree of medical certainty as to whether the problems that you are experiencing,

> the numbness in your fingers and in your hand are related to the cervical radiculopathy, the carpal tunnel or some other source? . . .
>
> A: I believe that the answer is yes. The *dominant* reason is due to radiculopathy and the inception of carpal tunnel syndrome following the accident. There are other reasons . . . . And it is the opinion of those who have seen me since professionally that there may have been a problem or a reaction to the surgery. Maybe something happened surgically that caused the problem.

(*See* 7/25/00 Trans. at 39-40 (emphasis added).

15. By the terms of the Exclusion Rider injuries "due to, contributed to by, or resulting from carpal tunnel syndrome; radiculopathy or injury, disease or disorder of the cervical spinal region . . ." are explicitly excluded from the benefits provided under the COLA riders effective October 14, 1991.

16. As a result of the complexity in determining the amount of Plaintiff's underlying disability claim, Rebekah Groves, an employee of UNUM, testified that although COLA benefits had been paid since 1994, it was not until August 1998 that UNUM discovered that it may be incorrectly paying COLA benefits and that such error was the result of an oversight due to "a lot of back and forth, back and forth with the financial unit in adjusting the benefits and changing the date of loss that it was just something that kind of got lost in the shuffle." (*See* 7/19/00 Trans. at 152-53). Given the complexity of Plaintiff's

claim, as evidenced by the entire testimony of both Plaintiff and Defendant throughout the trial, the Court finds Rebekah Groves' explanation credible.

17. Through the testimony of Constance M. Cardamone, Defendant demonstrated that through January 1, 2000, UNUM had paid a total of $88,361.23 under the COLA riders which were subject to the Exclusion Rider. (*See* 7/25/00 Trans. at 23-29).

18. UNUM is currently paying $2,792,54 per month under the excluded COLA riders, thereby bringing the current total of COLA payments to $110,701.55. (*See* 7/25/00 Trans. at 29).

19. Plaintiff's disability policies do not contain a provision for recovering incorrectly paid COLA benefits.

II. CONCLUSIONS OF LAW

1. The right to a jury trial in federal court, regardless of whether the claim arises under state law, presents a question of federal law. *See City of Philadelphia Litigation v. City of Philadelphia*, 158 F.3d 723, 726 (3d Cir. 1998).

2. As a general rule, the right to a jury trial is protected by the Seventh Amendment, when the claim is a legal one, but not if it is equitable. *See Hatco Corporation v. W.R. Grace & Co.*, 59 F.3d 400, 411 (3d Cir. 1995).

3. The Court has discretion to afford declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 (1994). In exercising such discretion the Court should consider the following factors: (1) the likelihood that the declaration will resolve the uncertainty of obligation which gave rise to the controversy; (2) the convenience of the parties; (3) the public interest in a settlement of the uncertainty of obligation; and (4) the availability and relative convenience of other remedies. *See Terra Nova Ins. Co. v. 900 Bar, Inc.*, 887 F.2d 1213, 1124 (3d Cir. 1989).

4. Unjust enrichment under Pennsylvania Law is a claim sounding in equity. *See Meehan v. Cheltenham Twp.*, 410 Pa. 446 (Pa. 1963). The essential elements of a counterclaim of unjust enrichment are benefits conferred upon plaintiff, appreciation of such benefits by plaintiff, and the acceptance and retention of such benefits under circumstances that would make it inequitable for plaintiff to retain the benefit without payment for value. *See Metropolitan Life Insurance Co. v. Brown*, No. CIV.A.97-2002, 1998 WL 1084680, at *4 (W.D. Pa. Dec. 1, 1998); *see also Burgettstown-Smith Twp. Joint Sewage Authority v. Lengeloth Townsite Co.*, 403 Pa. Super. 84, 88 (Pa. Super. Ct. 1991).

5. Defendant has no adequate remedy at law to recover incorrectly paid COLA benefits, thus it asserts equitable counterclaims for Declaratory Judgment and Unjust Enrichment.

6. Under Pennsylvania law, an insurer may recover payments to the insured under a mistake of fact or as a result of fraud or misrepresentation. *See Van Riper v. The Equitable Life Assur. Soc.*, 561 F. Supp. 26, 33 (E.D. Pa. 1982), *aff'd*, 707 F.2d 1397 (3d Cir. 1983) ; *see also Foster v. Federal Reserve Bank of Philadelphia*, 113 F.2d 326, 327-28 (3d Cir. 1940).

7. An agreement may not be avoided, regardless of consideration, if it contains language (in any form) that the signer intends to be legally bound. *See* 33 P.S. § 6 (1997).

8. The COLA Exclusion Rider was issued pursuant to the unambiguous terms of Plaintiff's Application of Change as said application explicitly contemplates UNUM's investigation of Plaintiff's medical history prior to the issuance of modified coverage. Nevertheless, the Exclusion Rider is enforceable independently as it expresses an intent by the signer to be legally bound as evidenced by the language "once this Exclusion Rider is signed, it binds all persons claiming any interest under the policy." *See* 33 P.S. § 6 (1997).

9. The terms of the Exclusion Rider are unambiguous in that it excludes payment of COLA benefits that are "due to, contributed to by, or resulting from carpal tunnel syndrome; radiculopathy or injury, disease or disorder of the cervical spinal region . . . ."

10. By a preponderance of the evidence Defendant has shown that Plaintiff's COLA benefits, effective October 14, 1991, are subject to exclusion as Plaintiff's injuries are at a minimum "contributed to by" radiculopathy and/or carpal tunnel syndrome. Specifically the Court finds Plaintiff's Application for Disability Benefits, Plaintiff's Attending Physician Statement, and Plaintiff's July 25, 2000, testimony concerning the nature of his disability persuasive on this issue. (*See* 7/25/00 Trans. at 39-40).

11. Defendant has demonstrated that the disputed COLA benefits were paid to Plaintiff upon a mistake of fact due to an administrative and/or clerical oversight.

12. Plaintiff has received COLA benefits which were subject to the Exclusion Rider in the amount of $110,701.55.

13. As Plaintiff was aware that the Exclusion Rider applied to Injuries "due to, contributed to by, or resulting from carpal tunnel syndrome; radiculopathy or injury, disease or disorder of the cervical spinal region . . ." the Court finds that it would be inequitable for Plaintiff to retain benefits to which he was not entitled.

14. Upon considering the appropriate factors with respect to the issuance of a Declaratory Judgment, the Court finds that such considerations weigh in favor of issuance. Such action will alleviate the need for further litigation over Plaintiff's future entitlement to COLA benefits, serves no

hardship upon the Plaintiff, furthers the convenience of the parties, clarifies Defendant's requirements under an otherwise uncertain obligation, and is an appropriate remedy as Defendant has no adequate remedy at law.

This Court's Final Judgment follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES E. PAPPAS,	:	CIVIL ACTION
	:	
v.	:	
	:	
UNUM LIFE INSURANCE COMPANY	:	NO. 97-7162

FINAL JUDGMENT

AND NOW, this 10th day of August, 2000, pursuant to Federal Rules of Civil Procedure 52(a) and 58, IT IS HEREBY ORDERED that judgment in the amount of $110,701.55 is entered in favor of Defendant and against Plaintiff Charles E. Pappas.

IT IS HEREBY FURTHER ORDERED that pursuant to 28 U.S.C. § 2201, the Court Orders that Defendant UNUM Life Insurance Company has no further obligation to provide Plaintiff, Charles E. Pappas, COLA benefits on his ongoing disability claim with respect to COLA benefits with an effective date of October 14, 1991.

BY THE COURT:

/s/ Herbert J. Hutton, J.
HERBERT J. HUTTON, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-2484

CHARLES E. PAPPAS, M.D.

Appellant

v.

UNUM LIFE INSURANCE COMPANY
OF AMERICA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 97-07162)

SUR PETITION FOR REHEARING
BEFORE ORIGINAL PANEL

BEFORE: ROTH, STAPLETON, and GREENBERG,
Circuit Judges

The petition for panel rehearing filed by appellant Charles E. Pappas in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

BY THE COURT:

Circuit Judge

Dated: May 29, 2001